No. 5724

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID G. BLAIR, Commissioner of Internal Revenue,

Petitioner,

vs.

JOHN H. ROSSETER,

Respondent.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

The facts in this case are completely stated in the transcript of record on file herein and also in the brief for petitioner, so will not be reiterated here.

DECISION BY THE BOARD OF TAX APPEAL.

On these facts, the Board of Tax Appeal found that the $50,000 paid to the respondent was a gift and upon this finding entered judgment in favor of John H. Rosseter, the petitioner before the board and respondent herein (Tr. pp. 15-19).

SUMMARY OF ARGUMENT.

There is only one issue in this case—whether the $50,000 received by the taypayer from the Sperry Flour Company was or was not a gift. In support of the respondent's contention, respondent relies first upon the fact that this $50,000 was a gift; second, upon the fact that whether or not this was a gift is a question of intention, and that a question of intention is a question of fact and not of law, and that therefore the finding of the Board of Tax Appeal that this was a gift, is conclusive and cannot be reviewed in the Circuit Court of Appeal.

ARGUMENT.

The payment to the respondent was a gift. There can be no dispute as to the evidence presented by the respondent before the Board of Tax Appeals. It stands uncontroverted and all the essential facts are supported by the corporate records of the Sperry Flour Company which appear in the transcript (pp. 5, 6, 7, 8).

The only vital question presented is what was the intention of the person or corporation making the payment of the $50,000? There is no way other than intention, to tell whether a payment represents a loan, a salary, gift or any other of the many things for which money is paid. In this case the intention of the Sperry Flour Company to make a gift is clear, and so the Board of Tax Appeals found in its decision:

> "Counsel for respondent (Mr. Rosseter) addressing himself to the question of intention,

> observed at the hearing that the corporate resolution is the best evidence and speaks for what the intention was. In the absence of facts or circumstances which discredit the intention expressed by the corporate resolution, it is certainly entitled to great weight. Applying such a test here the intention to make a gift is clear and conclusive."

Every act of both the company and the taxpayer is consistent with no other interpretation, viz., as both the stockholders' and directors' resolution expressly state that the payment was a gift; second, the company charged the payment to surplus and not to expense, and this charge was made immediately at the time of the payment and the payment was treated similarly on the company's income tax return. These facts bring the case squarely within the decision in *Appeal of Estate of David R. Daly,* 3 B. T. A. 1042, which involved the identical point at issue here, i. e., a gift by a corporation to one of its officers. There the Board of Tax Appeal said:

> "The essential elements of a gift are an intention to give, a transfer of title or delivery and an acceptance by the donee. Reviewing the evidence on this appeal we find an actual delivery of the property and the acceptance by the donee. The intention may be ascertained from the resolution of the Board of Directors and the subsequent treatment of the payment by the corporation. The three resolutions specifically designate the payments as gifts and the amounts thereof were posted in the corporate books to either the profits account or the surplus account, and were not treated as operating expense of the business. This consistency of treatment was carried into the federal tax returns of Gautier & Co. for the years 1917 and 1918 wherein the amounts were not claimed as deductions from gross income."

The instant case is even more favorable to the respondent than the *Daly* case. In its opinion in the instant case the Board of Tax Appeal said:

> "The facts in this case are even more favorable to the petitioner than those in David R. Daly, 3 B. T. A. 1042, in which case we held the payment to be a gift."

The feature of the present case which makes it even more favorable than the *Daly* case is the stockholders' resolution. If the directors were making a payment of compensation they would not have to secure authorization from the stockholders. The only possible reason for going to the stockholders for authorization of this payment is that the payment was a gift without consideration and the directors felt that they could not rightfully give away the stockholders' money without the approval and authorization of the stockholders themselves.

In the case of *Jones v. Commissioner of Internal Revenue* (to be found in Standard Federal Tax Service, 1929, Volume III, p. 8310, Dec. 9146), and its companion cases, that of *Livingston v. Commissioner, Patterson v. Commissioner,* and *Sommerville v. Commissioner,* the United States Circuit Court of Appeals for the Third Circuit in October 1928, on facts almost identical with those now before this court, decided that the payment was a gift. Quoting from that decision:

> "But when later the stockholders individually and without obligation on their part or any consideration then or theretofore received or rendered them, chose in recognition of the past faithful work of the staff to gratuitously give them

this financial recognition * * * we are clear the gratuity thus bestowed was a gift, * * *

Here it is clear that the amounts paid were not in satisfaction of any obligation of the corporation because, clearly, all obligations to the employees had been fully satisfied."

The petitioner in this case admits that the only obligation which existed between the company and the stockholders and John H. Rosseter, the respondent, was a salary of $6000 a year. They do not claim, nor can they claim, that the company owed Mr. Rosseter any further obligation and under the language of the above entitled case this is clearly a gift.

THE QUESTION OF INTENT IS A QUESTION OF FACT AND CANNOT BE REVIEWED IN THIS PROCEEDING.

There can be no argument in opposition to the statement that the intent of the parties is a fact, not a proposition of law; and in this case it is the controlling fact of the case.

28 *Corpus Juris*, 683;
Hicks v. Scott, 94 S. E. 999;
Wainess v. Jenkins, 18 N. Y. S. 627;
Ruiz v. Dow, 113 Cal. 490.

Did the parties intend this payment to Mr. Rosseter as a gift or did they intend it as something else? The Board of Tax Appeals in its decision contained in full in the transcript at page 15, by its findings of fact and its opinion based thereon, has determined that the intent of the stockholders or directors, the company and Mr. Rosseter clearly established that this

$50,000 was a gift. Having found this fact of intention to be true, the Board of Tax Appeals correctly rendered its decision in favor of Mr. Rosseter.

The statutes of the United States which provide for appeals from the Board of Tax Appeals to the Circuit Court of the United States specifically state that the findings of fact cannot be reviewed. The Board of Tax Appeals having found a clear intent to make the payment of this money a gift, this finding cannot be disturbed in an appeal to the Circuit Court of Appeal.

Revenue Act of 1924, Sec. 900G; 26 U. S. C. A. Par. 1218;

Revenue Act of 1926, par. 1003 A and B;

Avery v. Commissioner of Int. Rev., 22 Fed. (2d) 6.

CASES CITED BY THE PETITIONER.

The petitioner has failed to cite any case which is controlling in this matter. Its counsel rely to a great extent on the case of *Noel v. Parrot,* 15 Fed. (2d) 669. In that case the resolutions authorizing the disbursement were solely passed by the directors and not by the stockholders. The court lays great stress upon this point. Quoting from the decision:

> "It needs neither argument nor citation of authority to establish the proposition that the directors were without authority to give away the corporate assets and that for them to make to several of their members and to other persons a gift of a large sum of money from the corporate assets would be neither 'wise' nor 'proper' and would amount to an illegal misapplication of cor-

porate funds. We must assume that the directors did not intend such a flagrant violation of their trust."

There is one further fact in the case of *Noel v. Parrot,* which clearly distinguishes it from the instant case. As pointed out in the case of *Jones v. Commissioner of Internal Revenue* and its companion cases, cited supra, and in the *Noel v. Parrot* case, the amount paid to the various people was deducted in the corporations' income tax returns as salary. To quote from the decision:

> "The case of Noel v. Parrot was quite different in its facts. There its assets were paid out by the company and such disbursement claimed by it as a salary deduction from its gross income."

The case of *Beatty v. Commissioner,* 7 B. T. A. 726, cited and relied upon by the petitioner in this case, is an earlier decision of the Board of Tax Appeals than the one now under review. The instant case is the latest expression of opinion on this subject by the Board of Tax Appeals and should be given great weight and not lightly disturbed by your Honorable Court. In the case of *Hyams Coal Co. v. U. S.,* 26 Fed. (2d) 805, the court said:

> "The Supreme Court, and the inferior courts as well, recognize the quasi judicial quality of the functions of the Board of Tax Appeals, which has appellate jurisdiction of the decisions of the Commissioner. The findings of the board are entitled to great weight and should not lightly be disturbed. Blair, Commissioner v. Oesterlein Machine Co., 275 U. S. 220, 48 Sup. Ct. 87, 72 L. Ed.—cited on behalf of the government, must, however, be taken in its relation to the settled

> rule that any doubt in a taxing statute should be resolved in favor of the taxpayer and against the government."

There is one further feature clearly distinguishing the *Beatty* case from the case now at bar. In the *Beatty* case as pointed out by the court, Mr. Beatty was to receive an honorarium as Director Emeritus of the Department of Fine Arts of the Carnegie Institute of Pittsburgh. (This was in the nature of a retirement); but the Board of Tax Appeals based its decision upon the fact that Mr. Beatty was still on the payroll of the Institute and that his name was still connected with its Department of Fine Arts and that therefore, the honorarium was in consideration of his name remaining connected with the Institute.

> "The resolution retired him from active service but his name was still connected with the Department of Fine Arts of the Institute. He was still on the payroll. We are unable to say that the payments were without consideration or that they did not represent gain derived from labor."

This fact of the present and constant connection of Mr. Beatty's name with the Institute, running from Mr. Beatty to the Institute, is sufficient to distinguish it from the present one.

In the instant case there was no attempt made by the company to claim this $50,000 as a deduction. It is admitted by the petitioner that this amount was charged to surplus and was not claimed by the company as a deduction.

The petitioner in its brief on page 10 lightly disposes of this claim by stating that the government is

not at all concerned with whether or not this was deducted by the company; in fact, intimate that this would be an excessive payment and might be denied as a deduction because it is unreasonable, and in the same brief they attempt to claim that a salary of $6000 a year over a period of twelve years is not in accordance with a normal course and that respondent should have received an annual increase. How can they claim in one breath that the $50,000 is unreasonably large, and in the next breath that the $6000 annual salary was unreasonably small? If this is the contention of the government it is clear that had the company deducted $50,000 from its income tax, part if not all would have been allowed; but the company did not deduct any of it nor did it even attempt to. It showed its clear intent to give the $50,000 as a gift.

CONCLUSION.

In view of the foregoing it is respectfully submitted that the decision of the Board of Tax Appeals should be affirmed.

Dated, San Francisco,
June 1, 1929.

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